2019 IL App (3d) 170333-U

Order filed March 12, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-17-0333 Circuit No. 15-CF-514
DON C. WHITE, JR.,	)	
Defendant-Appellant.	)	Honorable Frank R. Fuhr, Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in (1) denying defendant's motion to quash arrest and suppress evidence where defendant failed to request a *Franks* hearing and the State presented the trial court with probable cause to grant a search warrant, (2) finding defendant guilty beyond a reasonable doubt of possession with intent to distribute based on the evidence the State presented, or (3) sentencing defendant within the low end of the sentencing range.

¶ 2 The State charged defendant, Don C. White Jr., with unlawful possession of a controlled substance with intent to deliver within 1000 feet of a school. 720 ILCS 570/401(c)(2) (West

2012); 570/407(b)(1) (West 2012). Defendant filed a motion to squash arrest and suppress evidence, arguing the search warrant leading to his arrest lacked probable cause and was stale. The trial court denied defendant's motion. Defendant appeals the trial court's denial of this motion as well as his conviction and sentence. We affirm.

¶ 3 FACTS

¶ 4 In July 2015, the State charged defendant with unlawful possession of a controlled substance with intent to deliver within 1000 feet of a school. 720 ILCS 570/401(c)(2) (West 2012); 570/407(b)(1) (West 2012).

¶ 5 Rock Island Police Officer Philip Ledbetter initially arrested defendant on July 8, 2015, for an outstanding warrant for parole violations. Ledbetter executed the arrest at that time knowing other officers were securing a search warrant for the Monte Carlo defendant exited immediately before the arrest. Officers had reason to believe defendant sold drugs out of the vehicle. They arrived at the scene with a search warrant for the Monte Carlo. The search yielded crack cocaine and several cell phones. The arrest occurred within 1000 feet of a school.

¶ 6 Defendant originally filed a discovery motion to obtain information about the confidential informant (CI) and the controlled buy so he could attempt to challenge the veracity of the affidavit in support of the search warrant. He moved to suppress evidence obtained as a result of the search warrant and to quash arrest. Officer Kris Kuhlman served as the affiant for the search warrant. He testified at the hearing on the motion to quash arrest and suppress evidence that he used a CI to conduct a controlled buy from defendant at some point in the 14 days prior to July 8. Kuhlman strip-searched the CI before and after the controlled buy. The CI left Kuhlman with money and no drugs and returned with no money and less than a gram of crack cocaine. The CI told Kuhlman he bought the drugs from defendant. Kuhlman showed the

CI a photograph of defendant; the CI confirmed defendant's identity. Kuhlman could not see in the car to identify the seller. Kuhlman obtained a search warrant for the Monte Carlo used in the controlled buy based on the information obtained from the CI. Kuhlman assumed the registered owner of the vehicle, Doneisha White-Bomar, was related to defendant based on her last name.

¶ 7 The trial court informed defense counsel that the proper procedure to challenge the veracity of the search warrant required her to file an affidavit for a *Franks* hearing. *Franks v. Delaware*, 438 U.S. 154 (1978). Counsel refused and the issue proceeded to trial.

¶ 8 The State presented the following evidence at defendant's bench trial. Ledbetter saw defendant driving the Monte Carlo multiple times. He saw defendant standing by the car earlier in the day on July 8. He arrested defendant as defendant exited the vehicle in the evening of July 8. Defendant threw the Monte Carlo's keys to Brandon Kelly when Ledbetter approached defendant. Kelly left the scene and never returned.

¶ 9 Ledbetter searched defendant's person incident to the arrest. Ledbetter found no drug paraphernalia but did obtain one cell phone and $305 in cash. Ledbetter and defendant waited in Ledbetter's squad car for officers to arrive with the search warrant for the Monte Carlo. Ledbetter did not attempt to contact White-Bomar for another set of keys when defendant disposed of his set.

¶ 10 Officer Jonathan Shappard worked in the tactical operations unit (TOU). He searched the car after Quad City Towing unlocked the Monte Carlo. In the center console, Shappard found a clear baggie containing two other baggies each containing what appeared to be crack rocks. The officers towed the car to the towing facility as a crowd of people formed around the car.

¶ 11 Officer Timothy Muehler, a member of the TOU, continued the search at the towing facility. Muehler noted the baggy containing other baggies containing cocaine in the center

console. He also found another phone in the center console. Muehler found a total of three cell phones in the car. The officer did not attempt to tie defendant to the phones. Muehler also found prescriptions for "Don White" in the car. Muehler had years of experience with drug crimes. He testified the crack cocaine found weighed approximately 7 grams. This weight included the packaging. Muehler testified user quantity is generally between .2 and .5 grams. One individual baggy weighed 3.5 grams and the other weighed 3.3 grams.

¶ 12 Denise Hanley, a forensic scientist, testified the crack rocks combined weighed 5.7 grams without packaging.

¶ 13 Garret Alderson, an analyst for the State, found a single partial fingerprint on the exterior of the plastic bag containing the two baggies. Alderson identified defendant's print as a match to the print found on the bag.

¶ 14 White-Bomar took the stand in defendant's defense. She testified she was defendant's sister. She owned the Monte Carlo but let multiple members of her family drive it. Her father's name is also Don White. She did not know her brother to sell drugs.

¶ 15 The trial court found defendant guilty of unlawful possession of a controlled substance with intent to deliver. The trial court based its ruling on the packaging, weight of the rocks, lack of paraphernalia, and presence of four total cell phones that defendant intended to sell the crack cocaine. The court convicted defendant of a Class X felony because of the enhancement of being within 1000 feet of a school. The court sentenced defendant to 10 years' imprisonment with credit for time served.

¶ 16 ANALYSIS

¶ 17 Defendant's original brief enumerated five arguments in his issues presented for review: (1) the trial court erred in denying defendant's motion to suppress evidence found in the Monte

Carlo and to quash his subsequent arrest, (2) the State compromised defendant's right to a fair trial, (3) the State presented insufficient evidence to support a finding of guilt beyond a reasonable doubt, (4) the State violated defendant's sixth amendment right to a speedy trial, and (5) the trial court's 10-year sentence was excessive. Defendant subsumed his sixth amendment argument within his fair trial argument in the body of his original brief. Defendant withdrew his second argument in his reply brief. Points not argued are waived. *Collins v. Westlake Community Hospital*, 57 Ill. 2d 388, 391 (1974). It is unclear whether defendant intended to waive his sixth amendment argument as well. Even if defendant did not intend to waive the argument, he forfeited the issue by failing to include sufficient citation to the record to attribute the delay to the State. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) (requiring arguments to be supported by evidentiary citations to the record or otherwise forfeited). We address only defendant's first, third, and fifth arguments.

¶ 18 1. Motion to Suppress Evidence

¶ 19 Defendant challenged the validity of the warrant to search the Monte Carlo. Specifically, defendant challenged (1) the lack of probable cause to support an inference that a car would have contraband from a controlled buy that occurred sometime in the two weeks preceding the issuance of the warrant, (2) the absence of information regarding the CI to make a determination of reliability, and (3) the possibility of staleness between the controlled buy and defendant's arrest. Kuhlman based the search warrant on the controlled buy he conducted sometime within the two weeks preceding July 8, 2015. Defendant argued Kuhlman included no information about the reliability of the CI in the warrant. Defendant maintained that without this information, and without reason to think evidence of a drug sale sometime in the 14 days prior would still be in the car, the trial court lacked probable cause to issue the warrant. He also questioned staleness

because a car, unlike a home, travels and this particular vehicle changed drivers frequently. The State countered that defendant should have requested a *Franks* hearing to address these issues as defendant's concerns of vagueness would properly be addressed in these proceedings. Because he did not, he forfeited the issue. Defendant maintained that, due to the factors enumerated above, the affidavit supporting the search warrant was essentially *Franks*-proof. *Franks*, 438 U.S. 154.

¶ 20 In *Franks*, the Supreme Court answered whether "a defendant in a criminal proceeding ever [has] the right, under the Fourth and Fourteenth Amendments, subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant?" *Franks*, 438 U.S. at 155. It held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Id.* at 155-56. The rule allowed the Court to maintain the "presumption of validity with respect to the affidavit supporting the search warrant." *Id.* at 171. The "challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Id.* The "deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." *Id.*

¶ 21 The Illinois Supreme Court faced a similar question in *People v. Lucente*, 116 Ill. 2d 133 (1978). The defendant, who the State also charged with possession of a controlled substance with

intent to deliver, filed a motion for a *Franks* hearing, seeking to quash the warrant to arrest and to suppress the seized evidence. *Id.* at 140. The defendant alleged that the officer's affidavit in support of the warrant contained intentional misrepresentations, specifically that a CI told the officer that he purchased marijuana from the defendant at his apartment at 8:30 p.m. the previous evening. *Id.* at 139-40. The defendant's motion was supported by affidavits from himself, his sister, and his wife, stating that they were together at the sister's home at the time of the alleged sale to the informant. *Id.* at 140. The circuit court granted the motion, held a *Franks* hearing, quashed the warrant, and suppressed the evidence seized. *Id.* at 139. The supreme court affirmed. *Id.* at 155. The court distinguished *Lucente* from *Franks* because the officer based the warrant entirely off of uncorroborated information supplied by the CI. *Id.* at 147-48.

¶ 22 Defendant should have requested a *Franks* hearing because he questioned the validity of the search warrant that led to his arrest. Even ignoring that procedural failure, the trial court did not err in denying defendant's motion to suppress evidence.

¶ 23 A reviewing court gives great deference to the trial court's findings when ruling a motion to suppress evidence. *People v. Grant*, 2013 IL 112734, ¶ 12. This court will not reverse a trial court's findings unless they are against the manifest weight of evidence. *Id.* We review the trial court's ruling on a motion to suppress evidence *de novo*. *Id.*

¶ 24 The fourth amendment of the Constitution provides "no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." U.S. Const., amend. IV. Illinois's constitution is in "limited lockstep" with the fourth amendment such that the state amendment has the same meaning and effect. *People v. Urbina*, 393 Ill. App. 3d 1074, 1078 (2009); see Ill. Const. 1970, art. I § 6.

¶ 25 Probable cause "means simply that the totality of the facts and circumstances within the affiant's knowledge at [the] time [the warrant is sought] 'was sufficient to warrant a person of reasonable caution to believe that the law was violated and evidence of it is on the premises to be searched.' " *People v. McCarty*, 223 Ill. 2d 109, 153 (2006) (quoting *People v. Griffin*, 178 Ill. 2d 65, 77 (1997)). "At a probable cause hearing, the trial court must make a practical, commonsense assessment of whether, give all of the circumstances set forth in the affidavit, there is a fair probability that evidence of a particular crime will be found in a particular place." *People v. Brown*, 2014 IL App (2d) 121167, ¶ 22.

¶ 26 Defendant argues Kuhlman did not present the trial court with evidence to show defendant would be in unlawful possession of a controlled substance in the Monte Carlo. To make that determination, we look at the totality of the circumstances set forth in the affidavit to determine if there was a fair probability that defendant would have contraband in the car. *People v. Lenyoun*, 402 Ill. App. 3d 787, 794 (2010).

¶ 27 Defendant raised the issue of the CI's identity as part of his objection to lack of probable cause. Defendant relied on *United States v. Glover*, 755 F.3d 811 (2014), for the proposition that "information about the informant's credibility or potential bias is crucial." In *Glover*, law enforcement primarily used uncorroborated information from a CI. Similarly in *Lucente*, the police relied on unsubstantiated statements that the informant bought drugs from the defendant at the defendant's apartment. *Lucente*, 116 Ill. 2d at 147-48.

¶ 28 Here, Kuhlman gave the court reason to believe the Monte Carlo would contain contraband. Kuhlman corroborated the CI's information. Kuhlman conducted a controlled buy with the CI. He strip-searched the CI before and after exiting the Monte Carlo. Controls like searching the CI before and after the purchase lend credence to the CI's statements and reduce

the likelihood that he lied. *Illinois v. Gates*, 462 U.S. 213 (1983). The controlled buy also established defendant's relationship with the car regardless of who held title to the vehicle. Most importantly, a defendant must challenge the veracity of the affiant to a search warrant, not the nongovernmental informant. *Franks*, 438 U.S. at 171. It was not manifestly erroneous for the court to find Kuhlman's claims credible.

¶ 29 Furthermore, pursuant to Illinois Supreme Court Rule 412(j)(ii) (eff. March 1, 2001), the State is not required to disclose the identity of an informant where the informant's identity is a prosecution secret and the informant is not a material witness to the case.

¶ 30 Defendant also argued the information contained in Kuhlman's affidavit was stale. " 'Staleness' refers to the amount of time that has elapsed between the facts alleged in the affidavit in support of the search warrant and issuance of the warrant." *People v. Beck*, 306 Ill. App. 3d 172, 180 (1999). Whether or not the information is stale is a fact specific inquiry. *People v. Rehkopf*, 153 Ill. App. 3d 819, 823 (1987). The reviewing court will not disturb the trial court's judgment unless it is manifestly erroneous. *Id.* at 824.

¶ 31 The search warrant was not stale. Kuhlman, as a police officer hoping to continue to use the CI, had an interest in protecting the CI's identity and listing the date of the controlled buy as at some point in the 14 days prior to July 8, 2015. The credibility of a controlled buy as opposed to an unsubstantiated tip is not lost on this court. Officers saw defendant driving the vehicle prior to his arrest. Officers saw defendant next to the vehicle on the day of his arrest. White-Bomar testified that she let defendant use the car at his leisure. Ledbetter arrested defendant for parole violations as defendant exited the car. Officers hoped to find crack cocaine as this was the drug obtained in the controlled buy. Kuhlman secured a search warrant for the Monte Carlo because this is the vehicle he observed during the controlled buy.

¶ 32 The issuing judge had sufficient information before her to establish probable cause to issue a search warrant of the Monte Carlo. The issuing judge's task was to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit, there is " 'a fair probability that contraband or evidence of a crime will be found in a particular place.' " *People v. Hickey*, 178 Ill. 2d 256, 285 (1997) (quoting *Gates*, 462 U.S. at 238–39). The trial court did not err in denying defendant's motion to suppress evidence.

¶ 33 2. Sufficiency of the Evidence

¶ 34 Defendant argues the State failed to present sufficient evidence to prove beyond a reasonable doubt that defendant intended to distribute a controlled substance.

¶ 35 We review a challenge to the sufficiency of the evidence in the light most favorable to the State. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). We will affirm if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* We will reverse only if the evidence is so improbable or unsatisfactory that it leaves a reasonable doubt as to the defendant's guilt. *People v. Flowers*, 306 Ill. App. 3d 259, 266 (1999). " '[W]e review the trial court's judgment, not its reasoning, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct.' " *People v. Ringland*, 2015 IL App (3d) 130523, ¶ 33 (quoting *Suchy v. City of Geneva*, 2014 IL App (2d) 130367, ¶ 19).

¶ 36 The State must prove the following to support a conviction for possession of a controlled substance with the intent to distribute: (1) defendant knew of the narcotics, (2) defendant possessed or had immediate control over the narcotics, and (3) defendant intended to deliver them. *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). This court has identified several circumstantial factors that, if found during the search, are probative of an individual's intent to

deliver: (1) an amount of the controlled substance that exceeds the amount typically possessed for individual use, (2) a controlled substance of high purity, (3) weapons, (4) large amounts of cash, (5) multiple cell phones, police scanners, or beepers, (6) drug paraphernalia, and (7) packaging that indicates distribution. *People v. Nixon*, 278 Ill. App. 3d 453, 457 (1996).

¶ 37 The State showed knowledge and possession of the narcotics with the positive fingerprint identification on the outside of the bag. Ledbetter saw defendant exit the car where the bag was found. The court also found defendant's act of throwing the keys to Kelly indicated knowledge and possession of the controlled substance. The State put on evidence for four of the seven factors probative of intent: (1) the bag contained 5.7 grams while Muehler testified personal use amounts ranged from .2 to .5 grams, (2) Ledbetter found several hundred dollars in cash on defendant's person, (3) officers recovered a total of four cell phones during the search of defendant and the Monte Carlo, and (4) the bag contained smaller, packaged amounts of crack cocaine. The State did not tie the cell phones to defendant but the phones, along with a prescription for "Don White," were in the vehicle at the time of defendant's arrest. Viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

¶ 38 3. Sentencing

¶ 39 The trial court has broad discretion in imposing a sentence. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A reviewing court awards the trial court's sentence great deference. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). A reviewing court will not alter the trial court's sentence absent an abuse of discretion. *People v. Streit*, 142 Ill. 2d 13, 19 (1991). The trial court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable. *People v. Morgan*, 197 Ill. 2d

404, 455 (2001). "[T]he reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *Stacey*, 193 Ill. 2d at 209.

¶ 40 The trial court did not abuse its discretion by sentencing defendant to 10 years' imprisonment. The statute subjected defendant to Class X sentencing. The range for a Class X sentence is between 6 and 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2014). The trial court noted the location of the school was not tied to defendant's offense. However, defendant was on probation at the time of the offense. In 2009, he pled guilty to voluntary manslaughter, intimidation with a dangerous weapon, and being armed with intent. The trial court gave defendant a sentence at the lower end of the range despite committing this crime while on parole. Defendant argues the trial court did not properly weigh mitigating factors. We presume the trial court considered any mitigating circumstances when sentencing a defendant. *People v. Anderson*, 225 Ill. App. 3d 636, 652 (1992).

¶ 41 The trial court did not abuse its discretion in sentencing defendant to 10 years' imprisonment. Defendant faced between 6 and 30 years' imprisonment. Defendant committed the crime while on parole for violent crimes. The sentence is not so arbitrary, fanciful, or unreasonable to overcome the strong deference in favor of the trial court's sentence.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we affirm the judgment of the circuit court of Rock Island County.

¶ 44 Affirmed.